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No. 86-852

SUPREME COURT OF THE UNITED STATES

October Term, 1986

J. VINCENT APRILE and
JULIE NAMKIN - - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

Petition for Certiorari to the Supreme Court of Kentucky

SUPPLEMENTAL BRIEF FOR PETITIONERS

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II. TABLE OF AUTHORITIES

The authorities relied upon are set forth in Section III of the Petition for Writ of Certiorari filed on November 24, 1986.

III. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The constitutional provisions, statutes and regulations relied upon are set forth in Section VI of the Petition for Writ of Certiorari filed on November 24, 1986.

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-852

J. VINCENT APRILE and
JULIE NAMKIN - - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR CERTIORARI TO THE SUPREME COURT OF KENTUCKY

SUPPLEMENTAL BRIEF FOR PETITIONERS

IV. INTRODUCTION

On November 24, 1986, Petitioners J. Vincent Aprile and Julie Namkin filed a Petition for Writ of Certiorari with this Court. The issues presented in the Petition arose from these public advocate attorneys' representation of an indigent defendant, Parramore Lee Sanborn, in his death sentence appeal. In *Parramore Sanborn* v. *Commonwealth of Kentucky,* the Supreme Court of Kentucky, four members concurring and three members dissenting, found the attorneys guilty of criminal contempt and imposed sanctions for failure to show cause why their brief was not timely filed.

Since the Petition was filed, the Supreme Court of Kentucky, in the case of *Brian Keith Moore* v. *Com-*

monwealth of Kentucky, finalized an opinion and order holding Petitioner Aprile in criminal contempt. Pursuant to Rule 19.4 of this Court, a single petition for writ of certiorari is filed covering both cases because these cases involve identical questions. This Supplemental Brief is filed pursuant to Rule 22.6, seeking a Writ of Certiorari in this second case.

V. STATEMENT OF THE CASE

This case arises from J. Vincent Aprile's representation of Brian Keith Moore in the appeal of Moore's conviction of murder, kidnapping and robbery charges.[1] For the murder offense, Moore was sentenced to death. Under Kentucky law, death sentences are subject to mandatory review (Kentucky Revised Statutes, Chapter 532). Timely notice of appeal was filed on December 6, 1984. Aprile, General Counsel for the Kentucky Department of Public Advocacy, was the attorney in charge of Moore's appeal.

Pursuant to an order of the Supreme Court of Kentucky entered August 12, 1985, Moore's brief was scheduled to be filed on or before August 12, 1985. On August 12, 1985, Moore, through counsel, filed a motion requesting an extension of time to and including June 12, 1986 in which to perfect the appeal and file his brief. By order entered on August 30, 1985, the Supreme

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[1]In the Supreme Court of Kentucky, this action was styled *Brian Keith Moore* v. *Commonwealth of Kentucky,* No. 85-SC-101-I. Aprile, one of the Petitioners herein, was the public advocate attorney representing Appellant Moore in the appeal of his death sentence. William M. Radigan was Petitioner Aprile's co-counsel.

Court of Kentucky granted Moore's extension. The court provided that if Moore's brief was not filed and his appeal perfected before June 12, 1986, Aprile and co-counsel "shall appear before this Court on June 24, 1986, . . . in order to show cause why they should not be held in contempt of this Court or sanctioned, for failure to timely complete the brief" (Appendix A, p.1a).

On June 10, 1986, Moore, through counsel, filed a second motion requesting an additional six months to perfect the appeal and file his brief. Aprile and his co-counsel noted the length and complexity of the case, noting specifically that forty issues were presented in the motion for new trial. Additionally, Aprile and co-counsel explained that their time had been limited by unanticipated appointments to other criminal cases. By order entered June 25, 1986, the Supreme Court of Kentucky granted an extension of only three months, to and including September 12, 1986 (Appendix A, p.1a).

On September 10, 1986, Aprile, as Moore's counsel, filed a motion requesting an additional three months in which to perfect the appeal and file the brief on behalf of Moore. This motion requested the same amount of time originally requested in the June 10 motion. Aprile cited the voluminous record in the case —the total transcript consists of thirty-six volumes comprising 4,781 pages—as one reason why he was unable to complete the brief within the time allotted. Further, Aprile noted, the case involves over sixty

issues to be presented for review in the appellate court. Aprile additionally cited his massive case load as a public advocate attorney.

By opinion and order entered September 25, 1986, the Supreme Court of Kentucky found Aprile and his co-counsel guilty of criminal contempt of court for failure to show why the brief was not timely filed pursuant to the Court's earlier order. This order was issued on a 4-3 finding of contempt by the Supreme Court of Kentucky. Chief Justice Stephens and Justices Leibson, Stephenson and Wintersheimer concurred in the finding of contempt. Justice Vance stated that he would impose sanctions, but without a finding of contempt. Justices Gant and White dissented (Appendix A, p.1a).

On October 2, 1986, Aprile filed a motion to vacate the court's opinion and order because one of the justices voting on the contempt charge had testified during the guilt-innocence phase of Moore's death penalty trial. The Supreme Court of Kentucky denied Aprile's motion to vacate on November 6, 1986 (Appendix B, p.6a).

On October 3, 1986, Aprile filed a motion for reconsideration, asking the Supreme Court of Kentucky to reconsider its opinion and order because there was no adequate basis to sustain the conviction of criminal contempt. Aprile argued that the order was fundamentally unfair and violative of due process because it failed to specify the elements of the offense, failed to make specific findings of facts and conclusions of law,

and failed to specify the standard of proof. Further, Aprile argued that the 4-3 finding of contempt did not satisfy the constitutional requirement of finding of guilt beyond a reasonable doubt. The Supreme Court of Kentucky denied Aprile's motion to reconsider on November 26, 1986 (Appendix C, p.7a).

ARGUMENT

Petitioner's argument is set forth in the Petition for Writ of Certiorari filed on November 24, 1986.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF KENTUCKY

85-SC-101-I

BRIAN KEITH MOORE - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Edmund P. Karem, Judge
79-CR-0976

OPINION AND ORDER

On August 30, 1985, this Court entered an order in the above-styled action granting appellant's motion for an extension of time to June 12, 1986, in which to file his brief and perfect the appeal.

In the same Order we further provided:

> "If appellant's brief is not filed and his appeal is not perfected on or before June 12, 1986, appellant's counsel, Honorable J. Vincent Aprile, II, and Honorable William M. Radigan, shall appear before this Court on June 24, 1986, at 11:30 a.m., in order to show cause why they should not be held in contempt of this Court or sanctioned, for failure to timely complete the brief."

Appellant's counsel, J. Vincent Aprile, II, of the Department of Public Advocacy and William M. Radigan failed to comply with this Court's Order and a hearing was

held on June 24, 1986, at which time Mr. Aprile and Mr. Radigan appeared and testified.

We find the following facts to be true: The transcript of evidence was filed on July 10, 1985. Thereafter, *on the day the brief was due* appellant's counsel failed to file his brief but instead filed a motion for a ten (10) month extension. The reasons for the requested lengthy extension included a recitation of the length of the record on appeal and counsel Aprile's present caseload; along with counsels' estimate, after reviewing the record and based on their present caseloads and past experience with appeals of comparable nature and size, that an additional ten (10) months would be needed to prepare appellant's brief. In paragraph seven of the motion for extension counsel stated that "[b]ecause this is a capital case in which the death sentence was imposed, the undersigned counsel believed this initial extension of ten (10) months is both reasonable and necessary under the circumstances." On August 30, 1985, this Court considered and granted appellant's requested motion for extension of time and entered the aforementioned Order.

Ten months later, *one day prior to the date the brief was due*, appellant's counsel failed to file his brief but instead filed a motion requesting a six (6) month extension of time. Counsel failed to comply with this Court's Order of August 30, 1985, to timely file appellant's brief and instead filed a second motion for extension of time which in large part recited the language of the previous motion for extension of time and listed "the length of the appellate record at bar, the number of preserved errors to be evaluated, and the imposition of the sentence of death" as reasons justifying counsels' request for an additional extension of time.

At the oral hearing conducted June 24, 1986, Mr. Radigan advised this Court that although he and Mr. Aprile

had served as appellant's trial counsel, neither he nor Mr. Aprile had completed reading the record in this case, nor begun writing appellant's brief. After eleven months and in spite of a pending show cause order, neither attorney had begun writing appellant's brief or had completed reading the record in the case. In a criminal case of this nature this Court will not dismiss an appeal for counsel's failure to timely file a statement of appeal and brief, but this Court cannot relinquish its authority by allowing counsel to decide when it is timely and appropriate for a brief to be filed, rather than following the orders of this Court.

Mr. Radigan and Mr. Aprile gave no adequate response to the Order of this Court to show cause. Both Mr. Radigan and Mr. Aprile served as trial counsel for appellant, however, after eleven months neither counsel has committed any portion of the appellant's brief to writing or read the record in its entirety. As appellant's trial counsel, both attorneys are thoroughly familiar with the record in this case and the issues of merit therein, and yet in the eleven months since the record was certified neither attorney has begun to work on the appeal, in clear violation of this Court's Order of August 30, 1985. While Mr. Aprile testified that his caseload as a public advocate prevented him from giving full attention to appellant's case, Mr. Radigan as a private attorney offered no excuse for his failure to begin work on appellant's brief. Upon accepting the responsibility of this appeal, Mr. Radigan agreed to devote the necessary time and energy to this case and as a private attorney who is able to control his caseload, he could not offer adequate reason for non-compliance with this Court's Order. Although counsel were fully aware that they would be unable to comply with this Court's Order of August 30, 1985 and timely file appellant's brief, they waited until the last day of the ten-month extension period

to request another extension. Counsel were granted a realistic deadline for filing appellant's brief. We cannot condone the practice prevalent in criminal cases of routinely seeking an additional extension of time on the last day of the extension period rather than filing the brief. When counsel is granted a lengthy extension of time in which to file a brief and it becomes impossible for counsel to file that brief, counsel shall inform this Court and request an additional extension at the earliest practicable date, justifying their inability to file the brief and the necessity for an additional extension of time to complete the brief.

We find no acceptable excuse for counsels' failure to begin writing appellant's brief or even complete reading the record on appeal before the date the brief was ordered to be filed. We further find that Mr. Aprile and Mr. Radigan are in contempt of the Order of this Court entered August 30, 1985, requiring them to file appellant's brief on or before June 12, 1986, or appear to show cause why they should not be held in contempt of this Court or sanctioned for failure to timely complete the brief. We find Mr. Aprile's explanations as to caseload to be inadequate to explain his lack of effort to commit any portion of appellant's brief to writing or to read the record. We find Mr. Radigan's explanations to be even more inadequate as he is in private practice and is able to control his caseload so that he may honor his responsibilities. We find no explanation for counsel's failure to notify this Court immediately if legitimate considerations prevented their compliance with our Order of August 30, 1985, when notified thereof.

Being duly advised, it is the order of this Court that said J. Vincent Aprile, II, is found in contempt of court and fined $500 for his contempt. It is further the order of this

Court that said William Radigan is found in contempt of court and fined $500 for his contempt.

In consideration of this being the first conviction for Mr. Aprile, payment of his fine is suspended subject to further conduct. Mr. Aprile appeared before this Court on June 24, 1986 (the same day as the hearing in this case) to show cause why he should not be held in contempt or sanctioned for failing to file appellant's brief in Parramore Sanborn v. Commonwealth, but technically his appearances before this Court on June 24, 1986 in these two cases constitute his first convictions for contempt of Court.

On December 22, 1983, this Court entered an Opinion and Order styled In Re Radigan, Ky., 660 S. W. 2d 673 (1983) adjudging William Radigan to be in contempt of this Court and fining Mr. Radigan $100.00 for his failure to timely file the brief for appellant, Joseph Herald, and for his failure to timely notify this Court of his alleged inability to comply with court ordered briefing. As this present conviction is Mr. Radigan's second conviction for contempt of this Court, his $500 fine is payable to the Clerk of the Supreme Court.

Costs of this proceeding are assessed against Mr. Radigan and Mr. Aprile.

Stephens, C.J., Leibson, Stephenson, and Wintersheimer, J.J., concur. Vance, J., would impose the fine and costs as sanctions for failure to comply with a court order without a finding of contempt. Gant and White, JJ., dissent.

ENTERED September 25, 1986.

/s/ Robert F. Stephens
Chief Justice

APPENDIX B

SUPREME COURT OF KENTUCKY

85-SC-101-I

BRIAN KEITH MOORE - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
79-CR-0976
Honorable Edmund P. Karem, Judge

ORDER

The motion of appellant, Brian Keith Moore, by and with counsel to vacate this Court's Opinion and Order of September 25, 1986, is denied.

Stephens, C.J., and Gant, Stephenson, Vance, White and Wintersheimer, JJ., sitting. All concur. Leibson, J., not sitting.

ENTERED: November 6, 1986.

(s) Robert F. Stephens
Chief Justice

APPENDIX C

SUPREME COURT OF KENTUCKY

85-SC-101-I

BRIAN KEITH MOORE - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
No. 79-CR-0976
Honorable Edmund P. Karem, Judge

ORDER DENYING MOTIONS TO RECONSIDER OPINION AND ORDER HOLDING WILLIAM M. RADIGAN AND J. VINCENT APRILE IN CONTEMPT

The motions to reconsider opinion and order entered September 25, 1986, holding William M. Radigan and J. Vincent Aprile in contempt are denied.

Stephens, C.J., and Gant, Stephenson, and Wintersheimer, JJ., concur.

Leibson, J., not sitting.

ENTERED November 26, 1986.

/s/ Robert F. Stephens
Chief Justice